No. 514

In the Supreme Court of the United States

OCTOBER TERM, 1938

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BENJAMIN FAINBLATT AND MARJORIE FAINBLATT, INDIVIDUALS, DOING BUSINESS UNDER THE FIRM NAME AND STYLES OF SOMERVILLE MANUFACTURING COMPANY AND SOMERSET MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The original findings of fact, conclusions of law, and order of the National Labor Relations Board (I. R. 469–495)[1] are reported in 1 N. L. R. B. 864.

[1] The record in the court below is in two volumes, separately paged. Volume II contains the supplemental proceedings pursuant to the order of the court below, dated October 15, 1937 (II. R. 13–14). The first volume will be referred to herein as "I. R." and the second as "II. R."

The supplemental findings of fact and the amended order (II. R. 227–239) are reported in 4 N. L. R. B. 596. The opinion and dissenting opinion in the Circuit Court of Appeals (I. R. 514–521) are reported in 98 F. (2d) 615.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 28, 1938 (I. R. 521). A petition for rehearing filed by the National Labor Relations Board was denied on September 8, 1938 (I. R. 522). Petition for certiorari was filed on December 8, 1938, and was granted on January 9, 1939 (I. R. 523). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Act may be validly applied to respondents, employers whose business consists of the processing of materials belonging to others, where the major portion of such materials are delivered to such employers through the channels of interstate commerce and, after processing, are in large part distributed through the channels of interstate commerce.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat.

449, U. S. C. Supp. III, Title 29, Sec. 151 *et seq.*) are set out in the Appendix, *infra*, p. 30.

STATEMENT

Pursuant to a charge (I. R. 1–3) filed by Local 149, International Ladies' Garment Workers' Union, a labor organization hereinafter termed the Union, the National Labor Relations Board, on January 28, 1936, issued a complaint and notice of hearing, which were duly served upon respondents (I. R. 4–11). The complaint alleged, in substance, that respondents had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3) and (5), and Section 2 (6) and (7) of the Act. Respondents appeared specially and filed an answer on February 4, 1936, in which they denied the allegations of the complaint and challenged the constitutionality and applicability of the Act (I. R. 12–16). On February 15, 1936, the Board, pursuant to Article II, Section 35, of its Rules and Regulations, Series 1, transferred the case to itself (I. R. 468, 471). A hearing was held on February 17, 18, and 19, 1936, before a Trial Examiner designated by the Board (I. R. 16–431). Respondents, although they appeared at the hearing and had full opportunity to participate, called no witnesses and introduced no evidence, but confined their participation to cross-examination of the Board's witnesses. Twice during the hearings respondents moved to dismiss the com-

plaint on constitutional grounds (I. R. 18–19, 430-431). Thereafter, pursuant to Article II, Section 36 (a) of its Rules and Regulations, Series 1, the Board directed the Trial Examiner to prepare an intermediate report, which was duly filed and served upon respondents (I. R. 432–467). Respondents did not file exceptions to the intermediate report and did not request oral argument or leave to submit briefs to the Board, although specifically advised of their right to make such application (I. R. 431). On June 3, 1936, the Board issued its findings of fact, conclusions of law, and order (I. R. 469–495).

Respondents neither complied with the order nor petitioned any Circuit Court of Appeals for its review. On June 17, 1937, two months after the decisions of this Court sustaining the constitutionality of the Act, the Board, pursuant to Section 10 (e) of the Act, petitioned the court below for the enforcement of its order (I. R. 500–508). On October 2, 1937, respondents filed with the court a petition for leave to adduce additional evidence before the Board on the grounds that they had failed to call witnesses and introduce evidence at the hearing because they then believed that the Act was unconstitutional, or, if constitutional, not applicable to respondents, and that the situation at the plant had changed in several respects since that time (II. R. 1–12). The court, we think erroneously, granted this petition (II. R.

13–14, 20–21), and a second hearing was held pursuant to notice on October 22 and 25, 1937, before a Trial Examiner designated by the Board (II. R. 14–226). Respondents produced and examined their witnesses. On December 17, 1937, the Board issued a supplemental decision (II. R. 227–239) in which it made findings of fact upon the additional evidence received and reaffirmed its original findings of fact, conclusions of law, and order, except that the order was modified in one respect referred to *infra* (note 9, pp. 11–12). The facts, as found by the Board and supported by the evidence, may be summarized as follows:

1. *The nature of respondents' business.*[2]—Respondents Benjamin Fainblatt and Marjorie Fainblatt are individuals doing business under the name of Somerset Manufacturing Company,[3] with their plant at Somerville, New Jersey (I. R. 473–474; III. R. 230–233). They are engaged in the business of tailoring textile fabrics into various types of women's sport clothing (I. R. 474). Neither the materials nor the finished products belong to respondents, but are the property of Lee

[2] The facts with relation to the jurisdiction of the Board are more fully detailed at pp. 15–17, *infra*.

[3] Both this title and that of "Somerville Manufacturing Company" were registered by respondents under the New Jersey Business Names Act (N. J. Compiled Stat. § 3686, Sup. 2528, Sup. 1781 [1931]) and both were used interchangeably until February 1935, when the latter title was discontinued (I. R. 473–474, 20–21).

Sportswear Company, a partnership located in New York City, composed of other members of the Fainblatt family, which pays respondents for their manufacturing operations on a piecework basis (I. R. 474–475).[4] The materials are sent to respondents' plant both from the plant of Lee Sportswear Company in New York City and directly from the mills, some of which are located outside the State of New Jersey (I. R. 474–475). The finished garments are sent either to Lee Sportswear Company in New York City or to the customers of that concern in other sections of the United States (I. R. 475).

There is a constant and substantial flow of materials and finished products to and from respondents' plant across state lines (I. R. 476). Respondents' output consisted of more than a thousand dozens of finished garments per month in 1934 and 1935 and has probably been even more substantial since 1937, when respondents increased their production staff from 60 to 200 (I. R. 490; II. R. 234).

[4] A plant such as that of respondents' is known as a contract shop—*i. e.*, one owned by an independent contractor who performs tailoring or other manufacturing operations upon materials owned by a "jobber" or "contract-manufacturer" who designs the garment and sells the finished product. Zaretz, *The Amalgamated Clothing Workers of America* (1934), pp. 25–27; Levine, *The Women's Garment Workers* (1924), pp. 398–401; United States Biennial Census of Manufacturers (Commerce Department, 1933), p. 180.

2. *The unfair labor practices.*[5]—Following the invalidation of the National Industrial Recovery Act in May 1935 respondents instituted a series of severe wage cuts among their employees (I. R. 477; 163–164, 198–201, 238–242, 262, 304, 344). About thirty-four of the fifty-odd employees in the tailoring department, found by the Board to constitute a unit appropriate for collective bargaining (I. R. 476–477), thereupon joined the Union in an effort to improve their wages and working conditions (I. R. 477–478; 120–123, 155, 185, 223–224, 252–255, 259–260, 275–277, 401; II. R. 171–172; Bd. Exhs. 3–44). Respondents immediately sought, through coercion and intimidation, to deny to their employees the right of free self-organization guaranteed in the Act. They invited the mayor and sheriff of Somerville and the owner of the factory building to the plant, where these persons delivered speeches against the Union to the employees (I. R. 487–488; 105–107, 169–173, 271–274, 300, 347–348, 363–365; II. R. 25–28, 35–36, 40–46, 56, 58, 65, 91–92). Respondents' supervisor of production was kept informed by one of the employees concerning who was active in the Union and what occurred at

[5] The record references in this portion of the Statement refer first to the Board's findings and then to the evidence upon which they are based. Since the court below expressly held that the Board's order should be enforced if respondents are subject to the Act (I. R. 514), and since respondents do not challenge the Board's findings as to the unfair labor practices, the evidence supporting those findings will not be discussed except in this Statement.

the Union meetings (II. R. 235–237, 95–97). Leon Gerofsky, respondents' attorney, testified that he had questioned the employees whether they had been invited to attend Union meetings and whether they had been asked to select a collective bargaining representative (II. R. 216–217).

A principal means of intimidation was that which is specifically forbidden by Section 8 (3) of the Act—discharge of employees by reason of their union membership or activities. Between August 14 and September 18, 1935, respondents discharged eight women employed in the tailoring department who were active in the Union.[6] Some of these eight were questioned concerning their Union activities by their supervisors shortly before their discharges (I. R. 482, 485–486; 231–234, 267, 304–308, 328, II. R. 68–77, 81–83, 115–122). In some cases the employees were informed at the time of their discharges that "you are causing too much trouble" (I. R. 482, 484, 486; 327–328, 347, 362, 378–380). The record reveals no "trouble" other than their being active in the Union. The others

[6] The group discharged included two of the three women who had first approached the Union and asked it to organize respondents' plant—Ethel Rice and Anna Santoro (I. R. 477; 117–120, 167–168, 181, 193, 211–212, 231, 308, 309). Four of those discharged were active in the Union's organization campaign (I. R. 482–485, 487; 193–194, 217, 219, 251, 265–266, 284–285, 331, 345–346, 385). All were members of the Union (I. R. 481–485; Bd. Exhs. 3–10; I. R. 193, 212, 242–243, 265, 274–275, 302, 327, 331, 349, 360–361, 375).

were told that there was no more work for them and that they could "go to the Union for work" (I. R. 482–485; 96–97, 192–193, 203, 236–238, 271, 304–308, 362). It was the busy season and there was plenty of work (I. R. 486–487; II. R. 234–235; I. R. 40, 221, 236–238, 271, 379). Moreover, while layoffs for lack of work were normally short, and were customarily terminated by notice from respondents that work was again available (I. R. 487; 295, 323–324, 332–333, 357, 365, 370, II. R. 129–130), the eight employees here involved were never notified to return, although new and inexperienced workers were subsequently hired, and at least one of the discharged employees applied for work several times (I. R. 487, 491; II. R. 234–235; I. R. 65–66, 82, II. R. 82–83, 85–88). The one or two girls who had attended the first Union meeting but had not joined were still at work at the time of the first hearing (I. R. 335, 355, 390).

On September 6, 1935, the Union was the authorized representative of the employees in the tailoring department for purposes of collective bargaining (I. R. 477–479; 120–123, 149, 252–254, 322, 394–403, 417, 454–455, 166, 219, 253, 319, 351, 366).[1] On that day Posner, the Union agent, tele-

[1] The photostatic copy of respondents' payroll for the week ending September 7, 1935, incorporated into the record pursuant to stipulation (I. R. 410–411; II. R. 152–153), lists 61 employees in the tailoring department, including all eight of the employees discriminatorily discharged. A comparison of this list with the union application cards admitted into

phoned Benjamin Fainblatt and requested his answer to certain demands theretofore presented by the Union (I. R. 479–480; 123–125). Posner testified that Fainblatt stated that "he will have no

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evidence (Bd. Exhs. 3–44) shows that 33 of the employees in the unit had selected the union as their bargaining agent prior to September 6 (Rice, Heitz or Vones, Katz, Santoro, Schoka, Matteis, Gecik, Yemma, Cicero, Torquato, Wirzman, Field, Turchi, Bachilega, Melewski, Hyling, Mosetti, Senna, Spatt, Hicks, della Peruta, Horan, Zigler, Morano, Recchia, Anna Lee, de Mattina, Hobbs, Kozar, Kolenda, Kelly, Felchin, Barone: payroll numbers 45, 81, 13, 36, 72, 75, 25, 16, 63, 66, 59, 63, 3, 17, 67, 76, 9, 4, 46, 50, 52, 64, 68, 14, 27, 29, 30, 18, 41, 2, 37, 26, 33; Bd. Exhs. 3–10, 12, 13, 15, 17–23, 25–31, 33–36, 38, 40–42). There are no union cards for 28 of the girls on the payroll (Grill, Koposock, Van Nest, Ackerman, Betheim, Kopf, Guisep, Drake, Bartley, Pacale, Zashwiega, Plum, Vadinski, Bonner, Sator, de Meilo, Sloketcho, Schnitzer, Elgaren, Rodinbaugh, Techam, Rhodies, Bierros, Phatiadors, Korwalzah, Gabinelli, Totten, Potter). There are nine additional union cards bearing names which do not appear on the September 7 payroll (Helen Lee, Gutowski, Nicastro, Pisane, Guiseppantonio, Milano, Demas, Petrone, Mame Ross; Bd. Exhs. 11, 14, 16, 24, 32, 37, 39, 43, 44).

The Union members thus constituted a clear majority of the 61 on the payroll at the time of the refusal to bargain. The bargaining unit of 59 found by the Board was computed by excluding eight employees who appeared on the payroll but did no work for the two-week period ending September 7 and adding back the six of these whose idleness was due to discriminatory discharge and who therefore remained employees within the meaning of the Act (I. R. 478–479). The record does not reveal the reasons why the other two (Pacale and Bierros) did not work during the two-week period. As shown above, even if they were included in the bargaining unit, bringing the number of employees in the unit to 61, the Union represented a clear majority of the 61.

dealings with me and he will not have anything to do with a union and that he does not recognize me as the legal representative of the workers" (I. R. 480; 125). The employees who were members of the Union thereupon unanimously voted to strike on September 18, which they did (I. R. 480–481; 53–54, 122, 125–128, 131, 189, 287–288). The Union's efforts to reopen negotiations for a settlement of the strike were thereafter rebuffed, respondents' attorney stating that "Mr. Fainblatt would not talk union or recognize anyone that had any connection with the union" (I. R. 480; 154, 156, 130, II. R. 211–212).[6] The strike was still in progress at the time of the Board's first hearing (I. R. 480; 249, 285, 329, 337–338).

The Board's conclusions of law and order.— Upon the findings and evidence summarized above, the Board concluded that respondents had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3) and (5) and Section 2 (6) and (7) of the Act (I. R. 481, 491–493). The order, as modified,[7] required re-

[6] Benjamin Fainblatt testified that at a subsequent meeting he told Posner that "before I will have an outsider running my business, I will get out of it and call it quits" (I. R. 98–102, 150–151; see II. R. 214, I. R. 115–116). According to Posner, respondents thereafter offered to reinstate the strikers individually provided they "dropped union affiliations" (I. R. 489; 156–157, 152–153, 115).

[7] The Board's original order required respondents to cease and desist from refusing to bargain with the Union as the exclusive representative of the tailoring employees and to bargain with the Union as such representative upon request

spondents to cease and desist from violating Section 8 (1) and (3); to reinstate with back pay the eight employees wrongfully discharged; to offer reinstatement, without back pay, to employees who went on strike where the positions they had left were filled by new employees first hired after the strike, and to place the remaining strikers on a preferred list, to be offered reinstatement as labor is needed; and to post appropriate notices (II. R. 238–239).

On July 28, 1938, the Circuit Court of Appeals for the Third Circuit, Circuit Judge Biggs dissenting, denied the Board's petition for enforcement of the foregoing order (I. R. 521). The majority, in an opinion by Circuit Judge Buffington in which District Judge Dickinson concurred, held that the order should be enforced if the Board had jurisdiction to issue it (I. R. 514), but that the Act could not be constitutionally applied to respondents for the reasons that they were not engaged in interstate commerce and did not purchase or sell goods

(I. R. 494). At the hearing to adduce additional evidence held pursuant to order of the court below (*supra*, p. 4), it appeared that respondents' tailoring staff had been increased to 250 employees (II. R. 234; 189–190). Since there was no evidence as to the membership in the Union at that time, the Board amended its order by striking out the provisions based upon the violations of Section 8 (5) (II. R. 234; 238–239). It is the supplemental order which was sought to be enforced in the court below. The appropriateness of the provision of that order requiring the reinstatement of employees who went on stike as a direct result of respondents' violations of the law is discussed at pp. 24–29, *infra*.

in such commerce (I. R. 514–517). Judge Biggs, dissenting, thought that since respondents' operations were part of a continuous flow of interstate commerce which industrial strife at the Somerville plant would burden and obstruct, the order should be enforced under the applicable decisions of this Court (I. R. 517–521). On September 8, 1938, the Board's petition for rehearing was denied (I. R. 522). The petition for certiorari was granted on January 9, 1939 (II. R. 523).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the National Labor Relations Act could not validly be applied to respondents' operations.

2. In holding that the buying, selling, or transporting of raw materials or finished products in interstate commerce is a prerequisite to the application of the Act to a manufacturing enterprise.

3. In not holding that respondents, by their actions, had violated Section 8 (1), (3) and (5) of the Act.

4. In denying enforcement to the Board's order.

SUMMARY OF ARGUMENT

I

Respondents are engaged in the manufacture of women's clothing from materials brought to their plant principally from other States. The finished products are distributed from the plant to other sections of the United States. Stoppage of operations

as a result of industrial strife between respondents and their employees would, therefore, directly obstruct the movement of substantial quantities of goods in interstate commerce. The National Labor Relations Act, accordingly, may validly be applied to respondents' relations with their employees. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

This conclusion is not affected by the fact that the materials and finished products do not belong to respondents. The Act may not be avoided on the plea that the commerce which respondents' labor practices affect is not respondents' commerce, but that of their customer. *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938. The niceties of title to goods have no relevance to the validity of an exercise of the commerce power under this statute when the actual movement of the goods is interstate. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453. In all determinative aspects respondents' enterprise is no different from the many manufacturing establishments of moderate size which have been held subject to the Act. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49.

The formula offered by respondents would remove from federal protection large amounts of interstate commerce which strife in the "contract

shops" would burden and obstruct. There is no constitutional justification for the suggested basis of limiting the power of Congress.

ARGUMENT

I

RESPONDENTS' MANUFACTURING OPERATIONS HAVE A CLOSE AND INTIMATE RELATION TO A SUBSTANTIAL FLOW OF INTERSTATE COMMERCE

The facts upon which the jurisdiction of the Board is based in this case are not in dispute. Respondents are engaged at Somerville, New Jersey, in the manufacture of women's sportswear (I. R. 20–22, 48). At the time of the unfair labor practices in the fall of 1935 respondents employed some 60 workers, but in 1937 the number of employees was increased to approximately 200 (I. R. 401; II. R. 189–190). The volume of business done is shown by the fact that before the increase in respondents' staff approximately 2,050 dozen finished garments were shipped from the plant during September 1934 and 1,230 dozen during the following September, when the strike occurred (I. R. 72–76, 78–80; see I. R. 490).

Respondents' plant is a so-called "contract shop" (see note 4, p. 6, *supra*). The manufacturing operations are performed exclusively upon materials owned by the Lee Sportswear Company, a partnership located in New York City, and composed of members of the Fainblatt family, which retains title to the materials and the finished prod-

ucts and pays respondents for their services on a piece-work basis (I. R. 21, 24, 26–30, 88–91).[10] Lee Sportswear Company, usually ships the materials, mainly cotton and wool textiles, either in cut or uncut form, from its New York plant to respondents' plant in New Jersey (I. R. 23–24, 29, 54–55, 92–93). Not infrequently the Lee Sportswear Company causes such materials to be shipped directly to respondents from the mills, some of which are located outside the State of New Jersey (I. R. 24–27, 92). As soon as possible after delivery of the materials, respondents' manufacturing operations are performed (I. R. 39–40). When these are completed, respondents hand the product over at Somerville to Sol Fainblatt—a son of respondent Benjamin Fainblatt—who occupies space in respondents' plant as a representative of Lee Sportswear Company (I. R. 50–52, 84–85, 87, II. R. 182–183). Sol Fainblatt ships some of the goods to

[10] The majority opinion in the court below quotes what it terms "contradictory and unwarranted findings" by the Board to the effect that respondents "caused substantial amounts of raw materials and finished goods to be purchased, transported, and sold in interstate commerce" (I. R. 516–517). The portion of the record referred to by the court in support of this statement (I. R. 470) consists of a summary, in the Board's decision, of the allegations of the complaint. The sentence quoted by the court is not a finding of fact at all. The Board's findings upon the nature of respondents' business appear at I. R. 473–476 and are fully supported by the evidence. This patent error by the court was pointed out in the Board's petition for rehearing, denied on September 8, 1938 (I. R. 522).

customers of the Sportswear Company located "throughout the United States"; the rest he sends back to the Lee Sportswear Company's plant in New York City (I. R. 52, 88–90).

It thus appears that there is a steady and almost daily (see I. R. 34) stream of materials across State lines to respondents' plant and of finished products from that plant to various parts of the United States. These movements of commerce are occasioned only by the existence of respondents' enterprise and will continue only while respondents' operations continue (see I. R. 191). Upon these facts, the test of the Act's application laid down in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41, whether "stoppage of * * * operations by industrial strife" would result in substantial interruption to the free flow of interstate commerce, is clearly satisfied.

Respondents contend, however, that the single factor relied upon by the court below—that respondents do not own the goods flowing to and from their plant—negatives any federal power to protect this commerce by regulating their labor practices. The argument is, in effect, that respondents' creation of burdens and obstructions to commerce may not be prevented by Congress because that commerce is the commerce of respondents' sole customer and not of respondents.

The same contention was rejected by this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938. The Court's opinion in that case sets forth as the basis of federal power the many effects upon commerce which would result from an interruption of the services furnished by the utilities involved. The commerce which the effects so enumerated would burden confessedly was that of enterprises other than the utilities. In accordance with the controlling principle that "It is the effect upon commerce, not the source of the injury, which is the criterion" (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, at p. 32), the fact that the commerce interrupted would be that of someone other than the one whose labor practices caused the burden was not deemed relevant. In related fields this Court has sustained the power of Congress to regulate businesses not themselves engaged in interstate commerce but whose practices caused obstructions to the commerce carried on by others. *United States* v. *Ferger*, 250 U. S. 199; *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. Cf. *Local 167* v. *United States*, 291 U. S. 293.

Similarly, this Court has specifically held that the niceties of title have no bearing upon the power of Congress to prevent the burdens and obstructions to the flow of commerce which result from industrial strife. In *Santa Cruz Fruit Packing Co.* v.

National Labor Relations Board, 303 U. S. 453, the employer contended that he was not subject to the Act, since the goods which he shipped out of California were sold f. o. b. points in that State. The Court dismissed the contention, stating that (303 U. S. at p. 463):

> A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, do not affect either the power of Congress or the jurisdiction of the agencies which Congress has established.

To the same effect are *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 72; *National Labor Relations Board* v. *Wallace Manufacturing Co.*, 95 F. (2d) 818, 819 (C. C. A. 4th); *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. (2d) 331, 334 (C. C. A. 6th).

The Circuit Court of Appeals for the Second Circuit has twice sustained the Board's jurisdiction over businesses engaged in rendering services upon goods belonging to others, where the goods passed to or from the servicing plants in interstate commerce. *National Labor Relations Board* v. *National New York Packing & Shipping Co., Inc.*, 86 F. (2d) 98; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97. In the former

case the employer's business consisted of the consolidating and otherwise arranging for transportation of packages received from or consigned to out-of-state points. In the *Hopwood* case the employer was engaged in repairing milk and ice-cream containers belonging to out-of-state concerns and brought to the plant across state lines (4 N. L. R. B. 922, 926).

The fact that title to the materials and the finished products is at all times in Lee Sportswear Company is therefore not material to the Board's jurisdiction. In all other interstate characteristics respondents' enterprise is indistinguishable from the many manufacturing establishments of moderate size held subject to the Act by this Court and the Circuit Courts of Appeals in an uniform line of decisions.[11]

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[11] *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board* v. *Fashion Piece Dye Works*, decided November 28, 1938 (C. C. A. 3rd); *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Wallace Manufacturing Co.*, 95 F. (2d) 818 (C. C. A. 4th); *National Labor Relations Board* v. *J. Freezer & Son*, 95 F. (2d) 849 (C. C. A. 4th); *National Labor Relations Board* v. *Eagle Manufacturing Co.*, 99 F. (2d) 930 (C. C. A. 4th); *National Labor Relations Board* v. *Bell Oil & Gas Co. et al.*, 91 F. (2d) 509 (C. C. A. 5th); *Renown Store Company* v. *National Labor Relations Board*, 90 F. (2d) 1017 (C. C. A.

The doctrine advocated by respondents would remove from federal protection interstate commerce of large bulk and intrinsic importance, even if limited to this one industry. In the large and important women's clothing industry [12] the "contract shop" is a prevalent method of production. In the year 1935, of a total of 3,414 enterprises engaged in manufacturing women's dresses, 1,676 employing 63,202 workers, were shops in which a single firm owns, manufactures, and sells the

6th); *Memphis Furniture Manufacturing Co.* v. *National Labor Relations Board*, 96 F. (2d) 1018 (C. C. A. 6th) certiorari denied, No. 272, October 10, 1938; *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. (2d) 331 (C. C. A. 6th); *National Labor Relations Board* v. *Kentucky Firebrick Co.*, 99 F. (2d) 89 (C. C. A. 6th); *National Labor Relations Board*, v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied 304 U. S. 575; *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. (2d) 671 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash and Chemical Corporation*, 98 F. (2d) 488 (C. C. A. 9th); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th).

[12] In the year 1933, the latest for which comparative figures are furnished by the Bureau of the Census, the women's clothing industry ranked ninth among manufacturing industries in number of workers employed, and eighth in value of product. In that year the industry furnished employment to 159,832 wage earners and produced a product valued at $846,309,000. United States Biennial Census of Manufactures (Commerce Department, 1933), p. 33. This excluded corsets, millinery, gloves, footwear, and hosiery, all classified under other industries. United States Biennial Census of Manufactures (Commerce Department, 1931), p. 324.

finished product to the retailer,[13] while 1,738, employing 48,217 workers, were "contract shops."[14] In the New York metropolitan area, the center of the American garment industry,[15] a survey made in 1935 revealed that 69 per cent of the enterprises engaged in manufacturing women's dresses, employing 78 per cent of the workers in the industry, were "contract shops."[16]

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[13] The respondent in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, was an enterprise of this character. See 301 U. S. at 72–73.

[14] United States Biennial Census of Manufactures (Commerce Department, 1935); p. 33. In the men's clothing industry in that year "contract shops" made up 1,230 of a total of 2,981 establishments, employing 56,282 wage earners out of a total of 154,583. *Id.*, p. 28. During 1935 about 400 of the 700 members of the National Association of Dress Manufacturers, Inc., operated "contract shops"; Gill, *The Dress Manufacturing Industry* (U. S. National Recovery Administration, Evidence Study No. 9, 1935), p. 23. In the men's clothing and children's wear industries the "contractors" have their own associations: Hathcock, *The Men's Clothing Industry* (U. S. National Recovery Administration, Evidence Study No. 24, 1935), p. 34: Gill, *Infants' and Children's Wear Industry* (U. S. National Recovery Administration, Evidence Study No. 19 (1935), p. 18.

[15] In the year 1935 the total value of women's, misses', and children's clothing produced in the United States was $1,269,624,289, of which $883,375,777, or approximately 69 percent, was produced in New York State. United States Biennial Census of Manufactures (Commerce Department, 1935), p. 398.

[16] See Sherman Trowbridge, *Some Aspects of the Women's Apparel Industry*, in United States National Recovery Administration, *Work Materials*, No. 44 (1936), p. 53.

If manufacturing enterprises are to be exempt from the Act for the single reason that the goods upon which their manufacturing operations are performed do not belong to them, a ready means is afforded for avoidance of federal control. By what Judge Biggs, dissenting in the court below, termed "an arbitrary separation of the manufacturing unit" from the supply and marketing unit (I. R. 520), a manufacturing enterprise which in its totality is indisputably engaged in interstate commerce, may withdraw its relations with its production employees from federal control although the commerce affected by those relations remains the same.[17] The Act's application is thus made to de-

[17] Prior to August 1934, respondent, Benjamin Fainblatt, was general supervisor of the Lee Sportswear Company's manufacturing department in New York City (I. R. 474, 108). After a dispute with the union representing the employees at that plant was settled by arbitration, Benjamin Fainblatt established the present business at Somerville, New Jersey, for doing the same kind of work as was formerly done in the manufacturing department in New York (I. R. 474, 109–113). Orshan Ruby, supervisor of production at the Somerville plant since its establishment, was formerly manager of Lee Sportswear Company's Long Island shop (II. R. 68, 91). Benjamin Fainblatt testified that Lee Sportswear Company supplied the necessary capital, receiving a chattel mortgage on the machinery (I. R. 474, 112–113) and that very little of this advance had been repaid at the time of the hearing (I. R. 113). Marjorie Fainblatt testified that she purchased the machinery and "loaned" it to Benjamin (II. R. 191–192). Lee Sportswear Company is a partnership composed of respondent Marjorie Fainblatt and two of Benjamin Fainblatt's sons, Leo and Irving (I. R. 474, 46–47, 94, II. R. 181). On these facts the Board

pend upon a factor which is irrelevant to the purposes for which Congress exercised its power over commerce in this statute, and to the settled bases of the validity of that exercise of power.

There is no constitutional justification for the limiting of federal control over commerce which respondent urges. Congress is granted power to protect all interstate commerce, not merely selected portions thereof. This power cannot be limited by the particular arrangements made as to title by businesses whose very existence depends upon the movements of goods through the channels of interstate trade.

II

THE REQUIREMENT THAT RESPONDENTS REINSTATE THE STRIKERS IS ENTIRELY PROPER UNDER THE ACT

The court below stated that the order of the Board should be enforced if respondents are subject to the Act (I. R. 514), and respondent does not urge the merits as a ground for affirmance of the decree below. We would therefore not deal with the particular provisions of the order in this brief but for the fact that the basis for one provision of the order has not heretofore been fully stated to this Court. We set out below a brief statement of the Board's position.

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was fully warranted in finding that "though technically an independent enterprise, the Somerset Manufacturing Company thus operates in fact as the principal manufacturing department of Lee Sportswear, a company engaged in selling sporting goods in interstate commerce" (I. R. 475–476).

Paragraph 2 (c) of the order requires respondent to offer employment to those of the striking employees whose positions are now held by employees first hired after the strike began, and to place the remaining strikers upon a preferential list to be offered employment according to seniority as labor is needed. No back pay is required (II. R. 238–239).

The power of the Board cannot be questioned. The Board found (I. R. 481), and it is undisputed, that the strikers ceased work in connection with a strike directly caused by respondent's refusal to bargain with the Union. They therefore remained employees within both categories of Section 2 (3): individuals who have ceased work "as a consequence of, or in connection with, any current labor dispute" and individuals who have ceased work "because of any unfair labor practice." Consequently they are directly within the grant of power to the Board in Section 10 (c) to require "such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies of this Act."

It is equally clear that the reinstatement order is an appropriate exercise of power. The policies of the Act are effectuated by restoring, as nearly as possible, the situation which obtained prior to respondents' unlawful refusal to bargain with the Union. Respondents' violation of the law caused the strike, and their persistence in refusing thereafter to observe the obligations of the Act pro-

longed the strike by eliminating all possibility of a settlement through negotiation. The Act is based on the premise that peaceful negotiation will avoid or settle industrial disputes. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44, 45; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 548. Respondents, therefore, cannot say that negotiation would not have avoided the strike, or yielded a settlement after the strike occurred. Respondents cannot rebut the presumption that the strikers reinstated by the order would have remained at or returned to their work except for the refusal to bargain.

Those out of work in direct consequence of respondents' violations of the law should not be penalized because they exercised the right to strike—a right expressly preserved by the Act (Section 13). Their only other offense was that they asserted the rights to self-organization and collective bargaining guaranteed them by Congress. The policies of the Act require that the status existing prior to respondents' unfair labor practices and the employees' resultant efforts to force respondents to conform their labor practices to the law of the land be reestablished. At the very least, this requires reinstatement of the strikers in preference to those hired to fill their positions after the strike began. Otherwise, those who assert their right to strike thereby lose the rights of self-organization and collective bargaining guaranteed by the Act.

Reinstatement of strikers, where the strike was caused or prolonged by the employer's refusal to bargain with the duly authorized representatives of his employees, uniformly has been sustained by the Circuit Courts of Appeals as the normal means of effectuating the policies of the Act. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576;[18] *Black Diamond S. S. Corp.* v. *Na-*

[18] In the *Remington Rand* case, as here, the strike was caused by the employer's violations of Section 8 (5). The Board ordered reinstatement of the strikers to positions available on May 26, 1936, when the strike began. The following excerpts from the Court's opinion show the rationale whereon it approved the reinstatement provision (94 F. (2d) at 871, 872):

> The act expressly preserves the right to strike, section 13, 29 U. S. C. A. § 163, and that includes a strike for refusing to negotiate as well as any other. It is a remedy parallel with recourse to the Labor Board: its use, when unsuccessful, but in a controversy where the men are right, ought not therefore to be prejudicial to them. Moreover—and this is conclusive—the remedy which the act provides expressly includes reinstatement as a part of it. It is of course true that the consequences are harsh to those who have taken the strikers' places: strikes are always harsh: it might have been better to forbid them in quarrels over union recognition. But with that we have nothing to do: as between those who have used a lawful weapon and those whose protection will limit its use, the second must yield: and indeed, it is probably true today that most men taking jobs so made vacant, realize from the outset how tenuous is their hold. * * * It is of course possible that the parties might have split over wages, or over the Elmira plant, even if the respondent had negotiated with the Joint Board. But since the refusal was at least one cause of the strike, and was a tort—a "substraction"—it rested upon the tortfeasor to disentangle the consequences for which it was chargeable

tional Labor Relations Board, 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579; *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Rela-*

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from those from which it was immune. Since it cannot show that the negotiations, if undertaken, would have broken down, it cannot say that the loss of the men's jobs was due to a controversy which the act does not affect to regulate. There may be cases where an employer can show this; if he can, it would indeed load the scales in an industrial dispute to give back their jobs to the strikers; but the respondent did not try to show that further negotiation would have been fruitless.

In the *Black Diamond* case the strike occurred prior to any unfair labor practices, but on December 14, during the strike, the employer refused to bargain collectively. The Board ordered reinstatement of the strikers to positions available on that date. The court said (94 F. (2d) at 879):

> Since the act expressly leaves the right to strike unaffected, any remedies they had were unaffected by continuing on strike. When, on December 14, 1936, the Black Diamond refused to bargain with the certified bargaining agent of its employees, it violated the act and became subject to such orders of the Board "as will effectuate the policies of this Act." Section 10 (c), 29 U. S. C. A. § 160 (c).
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> * * *
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> From the date of the respondent's first unfair practice its ordinary right to select its employees became vulnerable.
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> * * *
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> * * * under section 2 (3) of the act, 29 U. S. C. A. § 152 (3), the striking engineers still remained employees, and to "effectuate the policies of this act," section 10 (c) 29 U. S. C. A. § 160 (c), no more is done than to maintain the status quo which existed on December 14, 1936, as against unfair labor practices which occurred thereafter.

tions Board v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th). We submit that this relief is entirely proper under the Act and that the provision requiring respondents to reinstate the strikers should be enforced.

CONCLUSION

For the reasons above set forth it is respectfully submitted that the judgment of the court below should be reversed, with directions to enforce the order of the Board.

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JANUARY 1939.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. III, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1950